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November 15, 1993

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BY HAND DELIVERY

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1919 M Street N.W. - Room 802
Washington, D. C. 20554

93-266

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Commissioner
Federal Communications Commission
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Washington, D. C. 20554

Hon. Ervin S. Duggan
Commissioner
Federal Communications Commission
1919 M Street N.W. - Room 832
Washington, D. C. 20554

Re: Review of Pioneer's Preference Rules

Dear Chairman Quello and Commissioners Barrett and Duggan:

It is difficult for PCN America not to be somewhat paranoid about the Commission's proposals to review its Pioneer's Preference Rules.

In reliance on an understanding that "pioneers" in new services would be rewarded with licenses, PCN America first proposed PCS in America, first requested a PCS rulemaking, first suggested the 2 GHz (1850-1990 MHz) band, first proposed sharing that band, filed the first request for (and first obtained) an experimental license for PCS at those frequencies, first tested PCS propagation and interference, first overcame the initial skepticism about PCS by sponsoring the seminal demand study by A D Little, first proposed commercial

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and PCS use of CDMA spread spectrum for PCS, and first developed CDMA spread spectrum equipment for PCS. In all, PCN America has spent more than \$9.3 million to develop PCS. Yet, in the same Tentative Decision that declined to propose a PCS technology, the Commission denied PCN America a pioneer's preference allegedly because the bandwidths proposed by the Commission did not "correspond" with the bandwidths proposed and tested by PCN America.

Despite the Commission's astonishing initial failure to recognize PCN America's contributions to PCS, PCN America continued to rely on the standards previously articulated by the Commission. Indeed, it was PCN America that drafted the language that was ultimately enacted as part of the Budget Reconciliation Act explicitly stating that licenses could be awarded for "significant contributions to the development of a new telecommunications service or technology."

Now, the Commission has proposed to pull the rug completely out from under PCN America by (1) eliminating the policy altogether; (2) refusing to grandfather broadband PCS pioneers (while preserving the pioneer's preference to a narrowband PCS pioneer); and (3) alternatively revising the pioneer's preference standards to exclude pioneers whose contribution has been largely in the form of innovations regarding a new service. After readily acknowledging in months past the important role played by pioneer's preferences, 1/ and the significant contributions made by broadband PCS pioneers in particular, 2/ and in view of the explicit congressional grant of authority to award pioneer's preferences, it is incredible that the Commission could now even think of reversing its policy for broadband PCS. But we note that even if the Commission were to decide to continue its policy, its effort to revise retroactively the ground rules to exclude many of PCN America's contributions raises the deepest issues of equity and fair play. We also note that the Commission has not clearly set the line between "technology" and "services." Were the Commission to deny pioneer's preferences for "service" innovations in broadband PCS, it might have to deny preferences to APC and Cox as well.

1/ See, e.g., In re Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services, 6 FCC Rcd 3488 (1992).

2/ See, e.g., In re Amendment of the Commission's Rules to Establish New Personal Communications Services, FCC 92-467 (Nov. 6, 1992).

HOGAN & HARTSON

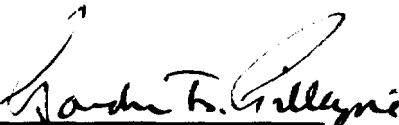
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We respectfully suggest that this rulemaking is utterly wrongheaded. PCN America requests the FCC immediately -- as well as fairly and properly -- to apply its pioneer's preference criteria as set forth in its Rules and award final preferences for PCS. Please see our attached Comments.

Respectfully submitted,

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All Applicants for PCS Preferences

Before The
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In The Matter Of)
)
Review of the Pioneer's) ET Docket No. 93-266
Preference Rules)

To: The Commission

COMMENTS OF PCN AMERICA, INC.

I. Introduction

As the true parent of PCS in this country, PCN America, Inc. is stunned by the Commission's apparent drive to deny it any value for its seminal contributions to the newly emerging service. PCN America:

- First proposed PCS in this country;
- First proposed to allocate spectrum for this family of new services;
- First filed a petition for rulemaking for PCS;
- First defined PCS as it has come to be defined; 1/
- First proposed the 2 GHz frequency range since selected by the FCC for broadband PCS;

1/ In its Petition for Rulemaking, PCN America defined PCS as "a lightweight wallet-sized wireless telephone connected to other telephones on and off the wireless network by a honeycomb of radio-based microcells supported by an intelligent network together with state-of-the art modulation techniques." Petition for Rulemaking at (i). The Petition also noted that the service would "offer[] advanced voice and data communications totally independent of, or in tandem with, the public switched telephone network." Id. See also In re Amendment of the Commission's Rules to Establish New Personal Communications Services, Notice of Inquiry, 5 FCC Rcd 3997, 3996 (1990).

- First noted that this frequency range had ideal propagation characteristics for PCS;
- First analyzed existing usage of these frequencies;
- First proposed, based on this existing usage, that the band 1850-1990 MHz be used;
- First made the novel suggestion that the band be shared with the incumbent point-to-point microwave users; 2/
- First submitted analyses to the Commission showing that microwave usage on these frequencies is relatively light in metropolitan areas;
- First demonstrated that there is a huge demand for PCS, by contracting for and presenting to the Commission the breakthrough demand study prepared by A D Little;
- First requested (and first received) an experimental license to examine PCS propagation and interference at 1850-1990 MHz;
- First proposed the use of CDMA spread spectrum techniques (until then largely relegated to military use) for commercial and PCS usage;
- First conducted PCS propagation studies and interference analyses in the 1850-1990 MHz band.
- First conducted extensive experiments using broadband CDMA equipment for PCS in the 1850-1990 MHz band.
- First developed broadband CDMA equipment for PCS.

2/ In the Pioneer's Preference Report & Order, the Commission explicitly observed that proposals to share or co-use allocated spectrum "may qualify" for a pioneer's preference. We believe this statement is directly attributable to PCN America's spectrum sharing proposal made several months earlier. To the best of our knowledge, PCN America's proposal to share the spectrum between incumbent microwave licensees and PCS was the first such proposal of its kind.

From the earliest suggestions about pioneer's preferences being used to recognize innovation in new communications technologies and services, PCN America has set its course with the understanding that if it could demonstrate the viability of PCS at the frequencies it suggested; if PCS could (even temporarily) share the frequencies with incumbent microwave users; and if the Commission should agree to allocate these frequencies to PCS, it would receive a pioneer's preference allowing it to participate in the new industry it had worked so hard to create. ^{3/} In all, PCN America has spent more than \$9.3 million and 5,000 mandays to develop PCS, all with the expectation that when licenses were issued it would have a fair opportunity to be rewarded with a preference.

PCN America was dumbfounded when the tentative preferences were awarded for PCS, without one being awarded to it. Yet, still believing in the basic fairness of the Commission and the principles behind the pioneer's preference concept -- and still relying on the standards articulated by the Commission for award of preferences -- PCN America continued to work for PCS and to support the pioneer's preference process. Indeed, when auction legislation began to gain momentum, it was PCN America that drafted the language ultimately included in the Budget Reconciliation legislation that preserves the Commission's ability to award licenses by pioneer's preferences, even when most

^{3/} The initial Petition for Rulemaking to create a pioneer's preference policy was filed in July 1989, four months before PCN America filed its Petition for Rulemaking for PCS. There was immediately considerable excitement about the pioneer's preference concept, and an NPRM was issued on April 27, 1990. In re Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services, 5 FCC Rcd 2766 (1990).

licenses for the service are awarded by auction. ^{4/} PCN America strove hard and successfully to convince Capitol Hill to include the language in the legislation.

In view of all of PCN America's efforts -- in reliance on the Commission's pioneer's preference policy -- it is difficult to consider the latest chapter in the pioneer's preference saga at the Commission as an exercise in fair dealing. We respectfully submit that (1) there can be no legitimate question about whether the auction legislation is consistent with the pioneer's preference concept -- the legislation itself explicitly permits awards of licenses for "significant contributions to the development of a new telecommunications service or technology," (2) the Commission may not in good faith deny pioneer's preferences to "broadband" PCS pioneers; and (3) the Commission should not -- and may not -- make the requirements for obtaining a pioneer's preferences more stringent for broadband PCS proponents retroactively at this late date.

II. The Budget Reconciliation Act Explicitly Accommodates Pioneer's Preferences

The Commission's NPRM correctly observes that the Omnibus Budget Reconciliation Act of 1993 permits the FCC to award pioneer's preferences. The NPRM quotes from the the House Report, which states that the language of the bill at that time was "expressly neutral with respect to these [pioneer's preference] policies." NPRM at 4, quoting H.R. Rep. No. 103-111 at 257. But in quoting this language, the Commission does not acknowledge that the House version of the bill did not contain any specific reference to the pioneer's preference policy. The Senate Bill did, however, contain PCN America's draft

^{4/} See the attached "leave behind" materials prepared by PCN America for meetings with House and Senate staff members concerning pioneer's preferences and the auction legislation in early April 1993.

language explicitly recognizing the pioneer's preference, and the Conference Report explicitly refers to the "Senate Amendment, including the provision of Section 309(j)(5)(E) concerning the so-called 'Pioneer's Preference.'" H.R. Rep. No. 103-213, 103d Cong., 1st sess. 485 (1993). Although it is true that Congress did not mandate use of the pioneer's preference, it is more than a little disingenuous for the Commission to question whether the Commission's pioneer's preference policy is "appropriate in an environment of competitive bidding" under the Act. There can be no question of Congress' intent. The issue of pioneer's preferences in the context of the auction legislation was thoroughly debated in Congress, and the fact that PCN America's proposed language was ultimately included makes that intent wholly incontrovertible.

There can be no question that Congress understood that pioneer's preferences as awarded by the FCC would not entail any auction payment. Indeed, we believe that Congress was swayed by the arguments presented to them by PCN America and others that the expectations of large revenues from PCS auctions were based on the groundbreaking work already accomplished by the PCS pioneers. Without the significant developments spearheaded by the broadband PCS volunteers, there simply would not be the opportunities for others -- including the federal treasury -- to benefit from the future of PCS. To exclude those pioneers now from obtaining the rewards they deserve would be grossly unfair, as well as short-sighted for the future development of services that may lead to other lucrative auctions.

III. Pioneer's Preferences Are Fair and Good Public Policy

All of the reasons that the FCC adopted the pioneer's preference system remain today. Innovators and pioneers must be given some monetary

incentive to develop new technologies and services. See NPRM at ¶ 6. It is ironic that as Congress has come to recognize the value of pioneer's preferences, the Commission is exhibiting a desire to back away from the concept.

We do not fully understand the Commission's suggestion that pioneers can somehow benefit by acquiring their licenses at auction, or that simple recognition of their efforts by the Commission will increase their likelihood of raising funds to bid. We respectfully submit that the Commission is completely missing the point. If they have no prospect of a substantial reward for their efforts, pioneers like PCN America will decline to spend their dollars developing new technologies and services, and will save their valuable resources for other pursuits. Indeed, it is beyond question that had the Commission not been moving toward -- and then adopted -- a liberal pioneer's preference policy, the companies like PCN America that were most responsible for developing PCS would have been focusing on other matters. Make no mistake, an entrepreneurial company like PCN America would not have invested over \$9.3 million to develop PCS without the encouragement of a pioneer's preference policy.

The Commission appears overly concerned with the size of the "reward" that pioneer's preference winners might obtain. We ask that the Commission consider what the likelihood is that PCS would stand where it does today without the efforts of PCN America and the other few significant pioneers. Remember that until PCN America wrote the lettering so boldly on the wall that even the cellular powers could not ignore it (with the A D Little demand study), the cellular industry took the position that there was no need for PCS in this country. Similarly, the microwave community that fought so hard to preserve their exclusive

licenses in the 1850-1990 MHz band was overcome only by the efforts of the burgeoning PCS community led by the PCs pioneers.

To alleviate any concerns about the magnitude of the reward, however, PCN America would support a proposal whereby pioneer's preference winners would be given a license for a 30 MHz BTA in their choice of markets, leaving the remainder of that MTA to be awarded by auction. But we cannot subscribe to any suggestion that the pioneer's preference winners be given anything less than 30 MHz in the 1850-1990 MHz band. It is these frequencies that PCN America was instrumental in developing, and PCS America was a leader in proposing and testing the CDMA technology that may ultimately be the choice for PCS in a 30 MHz band. There is no justification for "rewarding" PCS pioneers with less frequency in different frequency bands than they have tested all these months.

IV Pioneer's Preferences Should Be Awarded For Development of New Services

Since the idea for pioneer's preferences was first articulated, it has always been thought that it should apply both to new technologies and services. Indeed, the pioneer's preference docket was captioned "In re Establishment of Procedures to Provide a Preference to Applicants Proposing An Allocation of New Services." And the Commission's emphasis in adopting the pioneer's preference policy was on the development of new services. In its pioneer's preference NPRM, the FCC stated: "We believe that a 'pioneer's preference' is desirable for parties who endeavor to undertake the effort and risk associated with the development of new services and technologies." 5 FCC Rcd at 2766 (emphasis added). The Commission also noted that, while the patent and copyright laws protect inventors, writers and artists, "no system exists for rewarding those who

develop new frequency-based services. In our view, such a system is also warranted in order to encourage entrepreneurs and venture capitalists to invest time and money in new services and any related technologies." Id. at 2766-2767 (emphasis added). "We believe," the Commission concluded, "that the pioneer's preference system set forth below would adequately reward those who develop new services." Id. at 2767 (emphasis supplied).

When the Commission adopted its pioneer's preference rules, it also emphasized the application of the preference to new services. "We believe that, as a matter of communications policy, the pioneer's preference will serve the public interest in encouraging new and innovative communication services, and therefore serves communications goals that stand independent of the patent laws." 6 FCC Rcd 3488, 3490 (1991) (emphasis added). The Commission also noted the importance of "first proposing a new service and a reallocation of spectrum for that service." Id. at 3488 (emphasis added).

While the point where technology ends and service begins has never been clearly articulated by the Commission, there is no justification for refusing to give a preference based on innovative proposals for new services. As the Commission has recognized, to some extent technological innovation already has its own reward in the patent and licensing process. Innovations in new communications services, however, may be every bit as valuable, and yet they may not see any reward in the auction process except through pioneer's preferences. Even Congress recognized the value of the development of new services in the Budget Reconciliation Act by providing for the award of licenses for "significant contributions in the development of a new communications service"

Moreover, to change the criteria -- at least for broadband PCS -- at this point to exclude contributions to new "services" would be arbitrary and unfair. PCN America did not invent the idea of cellular, or even microcellular communications. But it was first to propose PCS here and to suggest how it should be accommodated in the crowded spectrum in this country. PCN America did not "discover" the 1850-1990 MHz band, but it did identify it as having perfect propagation characteristics for PCS, and it was the first to demonstrate that propagation in extensive testing. PCN America did not "create" the idea of sharing spectrum, but its proposal to share the 1850-1990 MHz band with incumbent microwave users was unique -- and absolutely crucial to further developments. PCN America did not "develop" the huge demand for PCS that is now the cornerstone of Congress' expectations of great revenues from the auctioning of spectrum. But it did demonstrate that demand at a time when many parties who now desperately desire to participate in PCS were saying it was completely unnecessary and unwanted. Finally, PCN America did not "invent" CDMA. But it was the first to actually propose that this military technology be used for commercial and cellular communications, and it was the first to extensively test broadband CDMA and to demonstrate how it could be used for PCS. PCN America also developed the first broadband CDMA equipment for PCS, and its equipment was used in numerous experiments conducted by others. Ultimately, PCN America's parent, Millicom, Inc., was awarded a national PCS license in the United Kingdom based on the CDMA technology that PCN America first proposed in the U.S. The FCC, on the other hand, has declined to pick a

technology -- preferring to leave this decision to the market. ^{5/} Considering that the Commission has decided not even to champion a particular technology, the suggestion that pioneer's preferences might be limited to technological innovations -- as opposed to services -- is especially unjustified.

PCN America's innovative proposals for the use of broadband CDMA for use in PCS, and its contributions to the understanding of this technology, themselves warrant award of a pioneer's preference under the "innovative technology" branch of the pioneer's preference standard. But in view of the Commission's prior decision that pioneer's preferences would be awarded for developments in both technology and services, PCN America has tended to focus on its overall combined contributions. Not only would any change in those standards now violate due process, but the Commission would have to give PCN America and others an opportunity to update their pioneer's preference requests in response.

V. The Commission Must Resolve This Docket Immediately, At Least For Broadband PCS.


As the Commission moves swiftly, in compliance with congressional directive, to begin licensing PCS, it is critical that the Commission quickly act on this NPRM and award final pioneer's preferences to deserving parties. We

^{5/} In re Amendment of the Commission's Rules to Establish New Personal Communications Services, Tentative Decision, FCC 92-467, at ¶ 5 (Nov. 6, 1992).

believe that the instant rulemaking is so wrongheaded and blatantly unfair that it should be withdrawn.

Respectfully submitted,

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By 
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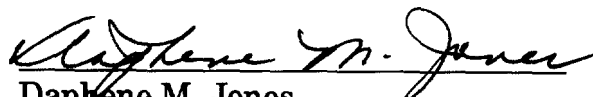
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November 15, 1993

Certificate of Service

I, the undersigned, do hereby certify that a copy of the foregoing
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